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Supreme Court of the United States

October Term, 1970

No. 1438

SCHMUTZ MANUFACTURING COMPANY, INC.,
Petitioner,

v.

DONALD L. ATKINS,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

The petition for certiorari incorrectly states (p. 2) that a single question is presented, and incorrectly assumes that Virginia has a tolling rule different from that applied by the court below. Before the question stated there by defendant (petitioner herein) may properly be reached, this Court must first resolve adversely to plaintiff (respondent herein) these preliminary questions:

1. If this case were submitted to Virginia's highest court, would it, on general principles or because of the special equitable circumstances present in this case, have refused to apply the tolling principle?

2. If so, would such an application of the Virginia statute of limitations, thereby giving effect to the Ken-

tucky courts' retroactive change of law, deprive plaintiff of his property without due process of law?

3. If not, is the result below correct by virtue of the federal transfer statute, 28 U.S.C. § 1406?

STATUTES INVOLVED

The Virginia tolling statute set out at pp. 2-3 of the petition is not involved because it does not purport to be exclusive. The following are involved:

28 U.S.C. § 1406(a): The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

United States Constitution, Amendment V: ". . . nor shall any person . . . be deprived of . . property, without due process of law . . . ."

STATEMENT OF THE CASE

The only relevant facts omitted in the statement by defendant (pp. 3-6) are that defendant's liability insurance carrier, Liberty Mutual Insurance Company, was also the workmen's compensation carrier for plaintiff's employer; that plaintiff was hospitalized for many months over a period of years at Liberty Mutual's institution in Boston, and that before the Kentucky action was dismissed Liberty Mutual's otherwise extensive knowledge of the facts of the accident and of plaintiff's condition were further buttressed and preserved by extensive depositions and discovery in the Kentucky action. See footnote 15 to the opinion of the court below, Appendix A, p. 7a.[1]

[1] The Kentucky docket entries, showing this discovery, are reproduced at pp. 21-25 of the Appendix in the court below.

ARGUMENT

I.

The Decision Of The Court Below Was Correct As A Matter Of Virginia Law.

The purpose of federal and state statutes of limitation is precisely the same: to guard against fraudulent and stale claims, surprise to the parties, and loss of evidence. *Street* v. *Consumers Mining Corp.*, 185 Va. 561, 575, 39 S.E.2d 271, 277 (1946); *Burnett* v. *New York Central Railroad*, 380 U.S. 424, 428 (1965). These purposes have been fully served by filing of plaintiff's Kentucky action, commenced before the Virginia two-year statute of limitations ran, by extensive discovery taken in that action, and by the coincidence of Liberty Mutual being both liability and workmen's compensation carrier.

There are three Virginia cases on the question of tolling of the statute of limitations by pendency of a prior suit:

Brunswick Land Corp. v. *Perkinson*, 153 Va. 603, 151 S.E. 138 (1930), sustained a plea of the statute in a common law suit for trespass to land because a prior statutory boundary proceeding was not on the same cause of action. The Virginia court said:

> "It is well settled, and needs the citation of no authority to that effect, that the statute begins to run when the right of action accrues. It is equally well settled that in its terms the statute is absolute, admitting of no exception which itself does not recognize, *unless under certain extraordinary circumstances, wherein the positive and plain requirements of an equitable estoppel preclude its application. For instance, the pendency of a suit to enforce a right of action, however long protracted, suspends its effect. This, of course, is obvious.*" . . . (Italics added.)

> "In order that the time during which a former action while pending may be available in repelling the statute in a subsequent case between the parties, it accordingly appears that the cause of action in the two cases must be substantially identical." 151 S.E. at 140, 141.[2]

Later, without retreating from this general *dictum,* the court in *Jones* v. *Morris Plan Bank,* 170 Va. 88, 195 S.E. 525 (1938), held a prior suit filed in a court *of improper venue* and dismissed *for that reason,* with no equities in favor of the plaintiff, did not toll the running of the statute to permit hearing of a second suit in a court of proper venue, solely because of an unquestionably demonstrated legislative intent to eliminate the *formerly permitted* tolling of the statute of limitations for a suit commenced *in the wrong forum:*

> "The Acts of 1893-94, c. 693, p. 789, and Acts of 1897-98, c. 226, p. 252, amended § 2934 of the Code of 1887 so as to toll the statute of limitations 'if in any pending cause, or in any action or suit hereafter commenced within due time in any of the courts of this commonwealth, the plaintiffs proceed or have proceeded in the *wrong forum* or bring the wrong form of action, or against the wrong defendant, *and judgment is rendered against the plaintiff solely upon such grounds.*'
>
> "In eliminating this provision the revisors of the Code of 1919, in their note to § 5826, said: 'The amendments made by the acts cited at the end of this section have been omitted, because they were deemed unwise.'
>
> "We thus see that in adopting the revision of this section as recommended by the revisors, *the General Assembly has expressly determined to eliminate the saving clause in favor of the litigant who, as the plain-*

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[2] Defendant's editing (p. 6, footnote 11) of a quotation from *Brunswick* changes its meaning; the Virginia *tolling* statute was *not* discussed in that opinion.

tiff here, has 'proceeded in the wrong forum.'" 195 S.E. at 527. (Italics added.)

No such problem of flouting demonstrated legislative intent was presented in Virginia's next, and latest, pronouncement on the subject, *Weinstein* v. *Glens Falls Ins. Co.*, 202 Va. 722, 119 S.E.2d 497 (1961), which the concurring judges below correctly considered "dispositive of this appeal" (Appendix A, p. 23a), and which the majority felt was more similar to the present case than *Jones, supra,* and might have persuaded the Virginia court to decide the present case differently than it did *Jones.* (Appendix A, pp. 5a, 6a, 16a).

Weinstein held properly overruled a plea of the statute of limitations in a chancery suit to reform an insurance policy, filed more than one year after loss, despite a one-year period of limitation set forth in the policy pursuant to statute,[3] because of the pendency of a prior law action on the same policy, since "the chancery suit was but a continuation of the claim asserted in the law action which was concededly brought in time, and the statute having stopped running upon the institution of the law action, the suit in chancery was not barred." 119 S.E.2d at 503.[4]

In view of the statement in *Brunswick, supra* pp. 3-4, that the Virginia court would recognize exceptions to the bar of the statute of limitations "under extraordinary circumstances, wherein the positive and plain requirements of an

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[3] It is not correct, as defendant says (p. 7, footnote 11) that *Weinstein* involved a "contractual," not "statutory," limitation. The limitation was written into the *Weinstein* policy *because required by § 38.1-366 of the Code of Virginia (1950).* 119 S.E.2d at 498. See Appendix A, p. 23a.

[4] Equitable relief was not available in the law action because Virginia has not adopted the federal system's merger of law and equity. Although some Virginia courts have both law and equity "sides," they are in effect separate courts. See Appendix A, p. 23a.

equitable estoppel precludes its application," it seems clear that if deciding this case, considering the great equities favoring plaintiff, the Virginia court would follow *Weinstein.*[5]

II.

To Deny Plaintiff A Trial Because Of A Retroactive Change Of Law Would Deprive Him Of Property Without Due Process Of Law.

As defendant points out (pp. 3-4), while plaintiff's Kentucky action was pending "the Kentucky Court of Appeals, *in overruling several of its prior decisions,* ruled that the Kentucky [one-year] statute of limitations would govern despite the longer limitation period of another state," and shortly thereafter "specified that this rule was to be applied retrospectively." (Italics added.) *Seat* v. *Eastern Greyhound Lines,* 389 S.W.2d 908 (Ky. 1965); *Wetherington* v. *Griggs,* 392 S.W.2d 56 (Ky. 1965). The Court of Appeals for the Sixth Circuit applied this change of law retroactively to plaintiff. *Atkins* v. *Schmutz Mfg. Co.,* 372 F.2d 762 (6th Cir. 1967), cert. den. 389 U.S. 829 (1967). We argued here then, as we did in the Fourth Circuit in the present action, that this retroactive change in the rules deprived plaintiff of property without due process, because:

> "When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby

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[5] These equities, described at pp. 2-3 *supra,* were recognized by the Sixth Circuit in plaintiff's prior action, 372 F.2d at 764, and by the District Court in this action (Appendix D, p. 15d). The 4th Circuit majority, in the final opinion below, correctly concluded: "Clearly it would be unjust and inequitable in the circumstances of this case not to give a tolling effect to the prior action. Enforcement of the time-bar here would serve none of the underlying purposes of the statute of limitations, and equitable considerations, absent in the *Jones* case, cry for mitigation of the statute's harshness." Appendix A, p. 6a.

> deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend [his] substantive right.'" *Bouie* v. *City of Columbia,* 378 U.S. 347, 354, (1964), quoting from *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill,* 281 U.S. 673, 678 (1930).

Brinkerhoff is closely analogous to this case. The Missouri Supreme Court construed Missouri statutes to mean that the state tax commission had no power to grant relief from discriminatory assessments of taxes. *Laclede Land & Improvement Co.* v. *State Tax Commission,* 343 S.W. 887 (Mo. 1922). Six years later, relying on this decision, plaintiff brought a suit in a state court to enjoin collection of certain taxes. The Missouri court held equity had no jurisdiction because it found, reversing the *Laclede* case, that a tax commission proceeding gave plaintiff an adequate remedy. 19 S.W. 2d 746. By that time, however, the special statute of limitations applicable to tax commission proceedings had run, and plaintiff was without a remedy. This Court reversed because "by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment [of the Missouri Supreme Court] deprives the plaintiff of its property." 281 U.S. at 679.

III.

The Result Of The Decision Below Is Simply To Effect A Transfer Clearly Permitted By Federal Law.

As the dissenting judge in the first, three-judge, decision below pointed out, even if Virginia courts would have sustained the plea of the statute of limitations, there were "at least two ways" in which plaintiff could have solved his problem as a matter of federal procedural law:

(1) When the Kentucky court retroactively changed its conflict of laws rule in the *Seat* and *Wetherington* cases, *supra* p. 6, plaintiff could then have sought a transfer of his then pending Kentucky action to Virginia under 28 U.S.C. § 1406(a), which permits transfer of a case "to any district . . . in which it could have been brought" if the suit originated "in the wrong . . . district . . . ," since a district is "wrong" whenever "there exists an obstacle to an expeditious and orderly adjudication on the merits." Appendix C, pp. 10c-11c. He cited *Goldlawr* v. *Heiman,* 369 U.S. 463 (1962), and *Internatio-Rotterdam, Inc.* v. *Thomsen,* 218 F.2d 514 (4th Cir. 1955), cited with approval in *Goldlawr,* in both of which cases transfer of pending suits from a federal court in one state to one in another in order to obtain service of process was approved although the result was to avoid the bar of the statute of limitations which would have applied had the actions been commenced anew in the transferee forums.

(2) Plaintiff originally could have filed suit in a Virginia federal court, despite the impossibility then of obtaining service of process because Virginia's "long arm" statute was not then in force, and then he could have transferred his case to the Kentucky federal court under § 1406, as applied in *Goldlawr, supra,* obtaining service in Kentucky and taking with him the two-year Virginia statute of limitations under the doctrine of *Mayo Clinic* v. *Kaiser,* 383 F.2d 653 (8th Cir. 1967), and *Dubin* v. *United States,* 380 F.2d 813 (5th Cir. 1967). Appendix C, pp. 16c-16d.

This is not merely the view of a dissenter in a vacated opinion. The five-judge majority in the final opinion appealed from here concluded: "Though here there was no transfer of the action in the Western District of Kentucky and the question of its transferability was not raised,

the commencement of this action in the Western District of Virginia during the pendency of the Kentucky action *has achieved the same practical result.*" Appendix A, p. 21a. (Italics added.)

IV.

The Decision Below Does Not Affect The Erie-Guaranty Trust Doctrine.

Guaranty Trust Co. v. *York,* 326 U.S. 99, 109 (1945), requires only that "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of the litigation, as it would be if tried in a State court." The majority opinion below does just what *Brunswick* and *Weinstein, supra* pp. 3-5, tell us the Virginia court would have done, in view of the equities favoring plaintiff. But even if this were not so, the Fourth Circuit has done no violence to *Guaranty,* based as it is on the policies underlying the rule of *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938). For this Court has said that *Erie* had "twin aims": "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna* v. *Plumer,* 380 U.S. 460, 468 (1965).

Here no "shopping" was available to plaintiff: When he first filed suit days before Virginia's two-year statute ran, Virginia courts offered no forum for lack of a "long-arm" statute, and he had no choice relevant here between suing in state and federal courts in Kentucky because both then (before the retroactive change of law which brings us here) would have applied the Virginia statute and permitted the suit. *Gibson* v. *Womack,* 291 S.W. 102 (Ky. 1927); *Collins* v. *Clayton & Lambert Mfg. Co.,* 299 F.2d 362 (6th Cir. 1962).

The opinion below hardly results in "inequitable adminis-

tration of the laws." Because of Liberty Mutual's dual position as workmen's compensation and liability carrier, and the discovery taken in the plaintiff's Kentucky action, clearly the court below was correct in saying: "Allowing Atkins to litigate the merits of his claim would not frustrate the oft-stated purpose of statutes of limitations to compel the assertion of a right of action promptly while the evidence is available and still relatively fresh." Appendix A, p. 7a.

And even if the Virginia court would have decided this case differently than the court below, its decision would still be correct in view of the policy enunciated by 28 U.S.C. § 1406, which would be frustrated by exalting form above substance and treating this litigation as anything other than a single action commenced in one district and carried on in another.

Nor was the Court in *Erie* or *Guaranty* faced with a due process question like that posed here by the Kentucky courts' giving retroactive application to a crucial change in decisional law (pp. 6-7 *supra*).

CONCLUSION

This is a highly unusual case, important only to the parties. It fulfills none of the considerations listed in Rule 19, § 1(b). In agonizing through a perhaps unprecedented three sets of opinions on a single appeal, the Fourth Circuit has achieved a just result correct under both Virginia and federal law. Certiorari should be denied.

Respectfully submitted,

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